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ABSTRACT

John Sparrow, British attorney and educator, argues that the current rejection of limitations on public decency in the name of freedom of speech needs reappraisal. His comments can be used as a basis to consider whether in the field of public decency the right of public expression in any medium is being upheld at the loss of respect for the personal right of individuals to protect themselves from such indecencies. If it is socially acceptable that people should be able to walk the streets without being physically assaulted, then perhaps they should be able to walk the streets without having their sensibilities assaulted by someone shouting four-letter words, by someone expressing himself nonverbally by exposing his genitalia, by graffiti or posters with objectionable words, or by sexually explicit pictures. It seems that laws must be interpreted by juries seeking to determine what might outrage a person of ordinary sensibilities. While many could become comfortable with laws permitting the protection of sensibilities in public, they still strongly object to the thought of censoring in the more private sphere of theatre, film, literature, painting, and sculpture. This belief in never censoring art and literature must also be reconsidered, since people also are affected by exposure to art and literature. (MKM)

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PROTECTION FROM ASSAULT

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The intent of the author is to facilitate a thoughtful reappraisal of our positions concerning freedom of speech by means of exploring some of those positions and the arguments which support them, following the analysis suggested by John Sparrow, Warden of All Souls College, Oxford.

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Protection from Assault

Our personal philosophies, our liberal sympathies, and our acceptance of Rationalism lead us to oppose laws which inhibit free speech.

Our personal philosophies, our liberal sympathies, and our acceptance of Rationalism lead us to favor laws which respect the personal rights of individuals.

It is our personal value systems which must arbitrate when these two desiderata come to an impasse -- when upholding individual rights demands, paradoxically, some kind of limitation on the freedom of individuals to express themselves.

I want to explore some of the values and the positions that you and I have taken, and do take today, and to reappraise some of the reasoning that has led us to those positions.

We already accept civil law restrictions on the freedom to express opinions in ways that transgress the individual rights of others in the dimensions of slander, libel, and copyright. In observance of such laws, I cannot, with impunity, publicly voice or write the judgment that you are an embezzler, a plagiarist, or a wife-beater when I cannot provide acceptable evidence to support such a conclusion, no matter what my purpose or frame of mind might be. In this regard, you are protected against me, and against the prospective damage those judgments might inflict on you.

I cannot publicly use your words as my own without permission, and possible credit or recompense to you. Your words are protected against my expropriation, no matter what my purpose or frame of mind might be. The advance of electrostatic and photocopying techniques made recent changes necessary, so now up-to-date civil statutes exist to deal with these situations.

Similarly, criminal statutes prevent me from publicly uttering or publishing speech that will breach the peace, or publishing information that will give aid to a national enemy in time of war. Our nation, then, is protected against revolt or subversion, no matter what my purpose or frame of mind might be.

These, then, identify circumstances which place the values of protecting individuals or of protecting a nation above the untrammeled right of an individual to express himself in just any way he might choose. These circumstances, then, help to define the concept of a civilized society, and to preserve it.

In these matters the collective force of law is accepted as the appropriate means through which to judge where the balance may lie between the rights of one indiviual to speak freely and the rights of another, or a group of others, to be protected from harm or loss as a result of the exercise of that freedom to speak.

It is in the field of public decency where many of us find ourselves taking an absolutist postion. We seek to protect everyone's right of public expression -- expression in any medium, in any vocabulary or symbolic mode he might choose -- no matter when or where or to whom he might decide to engage in that expression

As we support that absolute right we assert the primacy of individual values over the constraints of social values. We reject the thought of someone telling us that we cannot write and talk using certain words or topics. Equally we reject the prospect of the censor saying that we cannot read, listen, or watch someone's else free expression.

John Sparrow, attorney and Warden of All Souls College, Oxford, argues in his published lectures entitled Too Much of a Good Thing that the support for this kind of knee-jerk rejection of limitations focusing on public decency bears thoughtful reappraisal. In the hope that you will think along with me, I propose to review some of his observations, and invite your comments and questions so that wherever we wind up we can explain and clarify the arguments supporting our position for our own satisfaction, and for the better edification of others.

I have heard myself, and perhaps some of you, use three main grounds to oppose legislation and court decisions aimed at limiting speech on the basis of decency.

First, there is simply no agreement from one place to another, and from one time to another, about what is obscene, or what is indecent. Legislation against obscenity, Sparrow suggests, is like legislating against a cameleon by reference to its color.

Second, in addition to place and time differences, there is no agreement among people at a given time and in a given place regarding what is indecent or obscene. Laws specifiying criminal behavior should state clearly and precisely what they forbid.

Finally, in addition to the fact that few people will agree with each other about what is obscene, no single person can define the concept for himself. As he says, "That's obscene," he simply expresses his reaction -- his feeling about a situation or event. This means that legislation would not only oppose a chameleon, it would be directed

against a chimera-- a mythical monster!

Let's examine each of these objections.

To the point that perceptions of decency vary through time and place, and even among generations, it is a principle of law that a society legislates only for itself -- not for past, future, or foreign lands. If the law is written to take account of prevailing feelings within the community, and can be adapted as changes occur, that principle is being observed. It is useless to object now to the law that prohibited swim suits that permitted public view of ladies' ankles as it was in force in the early twentieth century.

Beyond that, this objector may explain that disagreement over definitions stems from the fact that indecency and obscenity arise from taboos based on feelings, rather that on rational grounding. The obvious implication is that society ought to be rational· the more rational the better. I submit that, even if it were possible to eliminate the non-rational from our society -- and I'm not prepared to admit even that possibility -- it would be intollerable. We do better to try for refinement, rather than the elimination of the emotional aspects of our society. A continuing exploration of what is seen and heard as obscene is possible, and desirable, and could be enhanced by legislation.

A second objector is a pragmatist. He accepts, for purposes of argument, that we want an anti-obscenity law, and says that it cannot be written because we cannot find the clear, precise definite words that laws must have if they are to be useful.

Let's, just for a moment, consider these criteria for judging the quality of legislative wording. Do we find clarity and precision -- either or both -- in our laws? Well, it depends. Income tax law is precise in stating liability, but is it clear in its explanation of the bases for determining that liability? On the other hand, some laws are clear in general rules but leave to a judge or jury the precise liability in a given case. A law making reckless driving or child abuse punishable is clear in its intent, but not at all precise. Given semi-darkness, fog, and sleet, it is arguably reckless to drive at 25 m.p.h. on residential streets when children are walking to or from school, though that is precisely the posted speed limit. And it is fatuous to define child abuse in terms of how many times one might strike a child with a baseball bat.

Still -- who would argue that we ought to rely on public goodwill and self restraint to pay the taxes and prevent child abuse? Instead, we adopt sometimes unclear, sometires imprecise laws and resolve individual differences of interpretation through the decisions of veniremen who try to determine what reasonable people would do or would approve in the case at hand. Negligence, "recklessness," and "applicable deduction from gross income" are as imprecise as "indecency" and "obscenity," yet they are written into law.

The third objection is that obscenity or indecency are inexplicable, unjustifiable feelings -- therefore they cannot be subject of legislation. They happen in particular situations which vary in several particulars. Who would, for instance, label intercourse between a man and his wife in their own bedroom as "Shocking," "disgusting," or "indecent"? But change the actors or the scene or

or both, and the answers begin to change: change the medium through which the scene is conveyed -- that is, do we describe it in words (if so, what words -- how explicit might they be), do we show a picture do we observe it at first hand? -- and the answers differ again.

Is it socially acceptable that I, or you, should be able to walk down the public street without my person being physically assaulted? We have bewailed the absence of safety from muggers in the big cities throughout a number of years. Is it less civilized, I wonder, that I should be able to walk the city streets without having my sensibilities assaulted -- perhaps by someone shouting four-letter words, or by graffitti or posters with such words, or sexually explicit pictures, or, perhaps, by someone expressing himself non-verbally by exposing his genitalia? Is it reasonable that I should be protected from the posters, but not the shouted language, or the language but not the exposure? Laws prohibiting physical assault, but not assault on the sensibilities make no more sense than a divorce law recognizing physical cruelty, but not mental cruelty. The fact that one cannot define, a priori, things which assault the sensibilities, or explain why he is distressed is not adequate grounds for denying some measure of protection under law. The law must seek the interpretation by the jurymen seeking to determine what might outrage a person of ordinary sensibilities.

These answers to the arguments concerning free self-expression in public suggest that a satisfactory law could, in fact, be written and could be executed so that the sensibilities of ordinary people might be protected from indecent assault in public. It must not be so written that any prude in the county could hail a person into court for

a heartfelt swearword uttered on a 105 degree day as a man changed a tire in the middle of a downtown street at noon. Courts or juries must decide what constitutes reasonable standards.

Turning from public to private concerns, we open a different perspective. From self-exposure, graffitti, billboards and shouting in the streets we move to such phenomena as photographs, movies, painting, and literature. We move to a different tradition in the development of western culture and law. The Romans had a member of their board of magistrates whose responsibility it was to maintain decency in public buildings, streets and markets. He was the audile. Many now are, or could become comfortable with laws permitting protection of ordinary sensibilities in public, but they curdle at the thought of empowering the successor to another of the Roman magistrates -- he who supervised manners and morals -- the censor, to perform in his more private sphere, where individuals may exercise their own choice concerning whether to expose themselves to possibly outrageous materials or not -- so long as they have some prior notification that they might experience shock or outrage.

It is at, or about, this point where the lines between the province of the aedile and the censor begin to blur. Shopwindow display of pornographic pictures rests clearly in the aedile's public domain. But when we are confronted in the midst of a book, or a play, or a TV show, without some prior warning of possible or probable affront, are we in the baliwick of the censor or the audile -- and, more important, is our claim for protection against outrage any less significant than it was at the shopwindow? It could be argued, after all, that we might have chosen not to be on that precise street at the moment

the flasher exposed himself. And, indeed, we might, had we been forewarned. But this, then, says that I may deny use of the street to any reasonably decent citizen simply by saying that I am going to display myself, or, perhaps, my poster. I submit that the common weal might not be thus best served.

But the theatre, film, literature, sculpture, painting, and their variants are ART -- and the artist should be unfettered by the law. The courts and juries cannot be empowered to define acceptable topics or proper language; the imagination and creativity of one person cannot be legally limited by the perspectives of another.

Here we arrive at a paradox. When we hold that the artist must be exempt from laws applying to others we take a position that is literally impossible to achieve. Because, though it is patent that all men may not be artists, artists are, by and large, a part of humankind. In order, then, to be set apart, the law must define the marks of distinction. So, in order to exempt specific works from evaluation on grounds that they are works of art, they must be created by one who has previously been determined to qualify as an "artist," according to the terms of the law. Lacking that proviso, we are all artists, and every object and every scrap of writing is art -- whether public or private.

At this point any view of art as having aesthetic, or civilizing qualities or characteristics has been exploded. Any traditional standards have been obliterated. We are at the point of saying that society loses more than it gains by attempting any such legislation. Denial of absolutely free expression to those who would write or paint, sculpt, or photograph would cramp their imagination and prevent the creation of a masterpiece, which may, after some years, no longer be seen as indecent.

It is impossible to demonstrate the margins of truth or error in this claim. Still, a case can be made that we are affected by, or that we are influenced by, that which we experience. Our attitudes, sometimes our character, may be altered by a poem, a painting, or a lecture. Any given event may have an impact on one person, while making absolutely no lasting impression on another. In sum, it seems that we must accept the general proposition that "things we read or see may influence us for better or for worse." We need not demand statistcal support for that proposition any more than for the proposition that "when one person loves another, his attitude, his judgment, and his actions toward that other are influenced by that emotion." Lack of statistical support does not suggest that either of these propositions ought to be rejected. They are supported both by our understandings of the words themselves, and by our individual personal experience.

The point here is that as one is exposed to stimuli with greater and greater frequency, his sensibilities become inured. His outrage decreases. The movement toward accepting what had been offensive gains momentum. One need only recall the scenes, the costumes (or lack thereof), and the language of stage, screen, TV, and the college coffee shop or the professional meeting of today, as contrasted with similar phenomena of ten years ago. Change there has been -- and the pace has been rapid.

Legislation restricting publication of obscenities has merit -- not because it may affect people's attitudes toward obscenities generally, but simply in order to protect people from outrage of their sensibilities, as society now provides legal protection from assault on one's person. We do not avoid laws prohibiting flailing others with a stick on grounds that they will get used to it after a while, and on further

grounds that the greater the frequency with which the flailing occurs, the shorter will be the time it takes to get used to it.

Freedom of expression is, in sum, an element in our society which, if left completely unrestricted, can constitute too much of a good thing.